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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND.

ON WRIT OF CERTIORARI TO THE JUSTICE COURT, PRECINCT NO. 1, POSITION NO. 2, HARRIS COUNTY, TEXAS.

BRIEF ON THE MERITS

Decision Below

The Decision below is not reported, but is printed in the Record at pages 14 and 18-19.

Jurisdictional Statement

(1) *Date of Judgment to be Reviewed*

The judgment which petitioner prays this Court to reverse was entered on September 24, 1934 (R. 14); and petitioner's motion for a new trial was overruled on September 25, 1934 (R. 18-19). The petition for the writ of certiorari was filed December 6, 1934, and was granted January 14, 1935.

(2) *Specific Claims Below*

(a) That Sections 2 and 27 of Article 1 (Bill of Rights) of the

Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, to authorize the disenfranchisement of which petitioner complains, violate petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10). Sections 2 and 27 of Article 1 read as follows:

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The court below in the case at bar sustained the validity of these Texas constitutional provisions so construed.

(*b*) Petitioner set up and claimed below that respondent had deprived him of his civil right to vote in the statutory Democratic primary election involved in this case; that this civil right to vote was protected against infringement by the Fourteenth and Fifteenth Amendments to the Constitution of the United States; and that this civil right had been denied and abridged by respondent as an officer of the State of Texas, and by agencies of government within the meaning of *Nixon* v. *Condon*, 286 U. S. 73 (R. 3, 8, 12).

(c) Petitioner claimed that he had a right, created by the Constitution of the United States, to vote for United States Senator and Representative in the election involved in this case, and that respondent had deprived petitioner of that right. (R. 7, 11).

These Federal claims were denied by the court below.

(3) *Statutory Provision Believed to Sustain Jurisdiction*

First. In Texas, there are three courts of original jurisdiction: District Courts, County Courts, and Justice Courts; District Courts and County Courts also have certain appellate jurisdiction. The jurisdiction of these courts, respectively, is provided for in Article

5, Sections 8, 16, and 19 of the Texas Constitution; and Articles 1906-1911, 1949-1960, and 2385-2387, 2454, 2460 of the Revised Civil Statutes of Texas, 1925. (These provisions are printed herewith as Appendices 4, 5, 6, and 7, respectively.)

Second. The Justice Court, because of the amount involved, was the only court having jurisdiction of the instant case under the constitution and laws of Texas. See Appendices 4, 5, 6, and 7.

Third. Because of the amount involved, no appeal was allowed from the judgment in the instant case to any other court, by the constitution and laws of Texas, either as of right or by permission of any court or judge, after application therefor. See Appendices 4, 5, 6, and 7; *Gulf, etc. R. Co.* v. *Rowlings*, 80 Texas 579, 16 S. W. 430; *Arrington* v. *People's Supply Co.*, (Tex. Civ. App.) 52 S. W. (2d) 678; 26 Texas Jurisprudence, Sec. 82, p. 879.

The law in Texas with regard to appeals from Justice Courts is stated very clearly in *Hudson v. Smith*, (Tex. Civ. App.) 133 S. W. 486 (writ of error denied by Supreme Court of Texas, see note 133 S. W. 486), as follows (p. 488):

> "Neither the Constitution nor the law gives the right of appeal from judgments of the justices' courts when the amount in controversy is not more than $20, exclusive of costs. An appeal is not a matter of right, but the right is conferred by the Constitution or statute. In the absence of such grant, the right does not exist. A judgment from which there can be no appeal is conclusive between the parties, unless absolutely void. The amount in controversy in the case wherein the judgment is sought to be enjoined was less than $20, and therefore within the exclusive jurisdiction of the court which rendered it, from which no appeal could be taken."

The appellate jurisdiction of the Courts of Civil Appeals and the Supreme Court of Texas is found in Article 5, Sections 3 and 6, of the Constitution of Texas, and Articles 1728 and 1819 of the Revised Civil Statutes of Texas, 1925. These provisions are printed herewith as Appendices 8 and 9, respectively.

Fourth. The record thus disclosing that "a final judgment or decree has been rendered or passed by the highest court" of Texas "in which a decision could be had" in the instant case, this Court has jurisdiction to review the decision below upon certiorari under

Section 237 (*b*) of the Judicial Code, Section 344 (*b*) of Title 28 of the United States Code.

(4) *Cases Believed to Sustain Jurisdiction*

Jurisdiction was held to exist in *Nixon* v. *Herndon*, 273 U. S. 536, and in *Nixon* v. *Condon*, 286 U. S. 73, to review identical Federal questions involved in this case. The identical Federal claims sustained by this Court upon the merits in the *Nixon Cases* were denied by the court below in the case at bar (R. 14, 18).

The authorities are unanimous that this Court has jurisdiction to review a final judgment of an inferior state court, where no appeal of any kind lies from that inferior court's judgment.

The general proposition is stated in the opinion of this Court in *Kentucky* v. *Powers*, 201 U. S. 1, 37, as follows:

> "But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege, or immunity asserted. This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed."

In the case *of The Moses Taylor v. Hammons*, 18 L. Ed. 397,

suit was, as in the instant case, brought in a justice court. Under the California law, the state in which the suit was brought, an appeal lay to the county court, whose judgment, on account of the amount involved, was non-appealable. This Court reviewed and reversed the judgment of the county court, saying upon the jurisdictional question (p. 400):

> "The decision of the county court was the decision of the highest court in the State which had jurisdiction of the controversy. From that court, therefore, the case is brought here by writ of error."

Other cases upholding the same principle are:

Downham v. *Alexandria*, 19 L. Ed. 807.

Missouri, etc. v. *Elliott*, 184 U. S. 530.

Western Union v. *Hughes*, 203 U. S. 505.

Section 3214 of Hughes' Federal Practice states the broad principle as follows:

> "It makes no difference how minor or unimportant the state court may be if its decision is final and there is no higher court having jurisdiction."

Statement of the Case

First. This is the fourth time that a Negro citizen has found it necessary to apply to this Honorable Court for the protection of his civil right to vote in the statutory Democratic primary elections of Texas.

(*a*) *In Love* v. *Griffith* (decided October 20, 1924), 266 U. S. 32, the question was moot before it reached this Court, but this Court said that "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

(*b*) In *Nixon v. Herndon* (decided March 7, 1927), 273 U. S. 536, the question was not moot and the Negro's constitutionally protected civil right to vote in the statutory Democratic primary elections of Texas was established beyond doubt and a Texas statute which sought to destroy the right was declared unconstitutional, this Court saying that "it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the *right* set up in this case." (Italics ours.)

(c) *Nixon* v. *Condon* (decided May 2, 1932), 286 U. S. 73, arose when, taking refuge behind the rule that the Fourteenth and Fifteenth Amendments are restraints upon the states and not upon private individuals, another Texas statute, passed as was said because of "an emergency and imperative public necessity" created by *Nixon* v. *Herndon, supra*, "lodged the power" (as this Court found in *Nixon* v. *Condon, supra*) in the State Democratic Executive Committee of Texas to deprive Negroes of their civil right to vote in the Texas statutory Democratic primary elections. This Court held that the State Committee was an organ "of the State itself" and laid down the broad rule that (p. 88) "Whether, in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this Court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere."

(d) Following the second *Nixon Case*, Negroes were again deprived of their civil right to vote in the statutory Democratic primary elections of Texas, and the instant case presents the fourth challenge to the constitutionality of that deprivation, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Resolution Involved

Second: In *Nixon v. Condon, supra*, as proof that the State Democratic Executive Committee of Texas had no power by virtue of its being to say what citizens could become Democrats and what citizens could not, this Court made the following statement at page 84: "Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. Bryce, Modern Democracies, vol. 2, p. 40." (Italics ours)

Assuming that the Democratic Party is a "state political party" —which petitioner alleges that it is not—and placing a favorable significance upon the word "Whatever" in the above quotation from this Court, the State Democratic Convention of Texas promptly passed, on May 24, 1932, the following resolution (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and Laws of the State shall be eligible to membership in the Democratic party and as such eligible for participation in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113,

and *Mason* v. *Committee*, 74 S. W. (2d) 326, where this difference in reading of resolution may be found.

State Constitutional Provisions and Court Decisions Challenged in Instant Case

Third. Since its adoption and the deprivation under its authority of the legal right of Negroes to vote in the statutory Democratic primary elections of Texas, the above resolution has been before two Texas Courts of Civil Appeals and the Supreme Court of Texas. *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123; *Bell* v. *Hill*, 74 S. W. (2d) 113; and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326. These cases are tacitly relied upon by the court below as authority for the judgment in the instant case.

(*a*) In the *Booker Case* (Cobbs, J. dissenting) the Court of Civil Appeals at San Antonio, through Special Justice Searcy, thought that its decision upholding the resolution was "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*." Expressing the same thought the late Chief Justice Fly, in a concurring opinion, said (p. 129) that *Nixon* v. *Condon*, "after destroying the ship of party power and rule, threw out a spar upon which the party might keep its head above the tumultuous political sea of 1932, that spar being the convention of the party, not acting on any State mandate, but on its unfettered volition." But this spar was discovered only after the Chief Justice had thus written (p. 129): "However much the logic and strength of the minority opinion in the case of *Nixon* v. *Condon*, herein cited, may excel those of the majority opinion, however much we may differ with the majority opinion, representing only five of the nine judges of the Federal Supreme Court, still it is the law of the land, and this Court will endeavor to follow not only its spirit but its letter."

(*b*) The *Mason Case* merely followed the *Booker* and *Bell Cases*.

(*c*) In the *Bell Case*, decided July 20, 1934, the Supreme Court of Texas gave its approval to the *Booker Case*, but expresely disagreed with this Court's decision in *Nixon* v. *Condon*, *supra*, saying through Chief Justice Cureton (p. 121):

> "Justice Cardozo held that a proper construction of this statute was that the power to declare the membership of the party had been conferred upon the State Committee by law,

> and that the effect of this was to make the committee a state agency, which could not discriminate between the white and Negro races in fixing the membership of the Democratic Party. *With this construction of this Texas statute we cannot agree.* The State Executive Committee of the Democratic Party in Texas is just what its name implies—a committee clothed with executive power to carry out the will of the party." (Italics ours.)

The Supreme Court of Texas further held that, if this Court's construction of Article 3107 of the Revised Civil Statutes of Texas should prevail upon the proposition of whether the State Democratic Executive Committee was an agency of government within the 14th or 15th Amendment (which this Court said in *Nixon* v. *Condon* it "will determine for itself"), then said statute would be "plainly void, because in violation of sections 27 and 2 of the Bill of Rights" (Article 1) of the Texas Constitution, which read as follows (R. 10):

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The Supreme Court of Texas further held (p. 119) that the power thus to discriminate against Negroes was guaranteed and protected by "the first section of the Bill of Rights, the First Amendment to the Constitution of the United States."

Petitioner challenges said Sections 2 and 27 of Article 1 (Bill of Rights) of the Constitution of Texas, thus construed, and the decisions construing them, as violating petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10).

Petitioner's Injury

Fourth. On July 28, 1934, a statutory Democratic primary elec-

tion was held in the State of Texas, of the same character as the ones involved in *Nixon* v. *Herndon* and *Nixon* v. *Condon, supra*, at which nominations, equivalent to election, were made of United States Senator, United States Congressman, and state, district, county and precinct officers.

In obedience to the mandate of Article 2956 of the Revised Civil Statutes of Texas, absentee voting was being conducted on July 9, 1934, by the respondent, Albert Townsend, who was the duly elected, qualified, and acting county clerk of Harris County, Texas. Said article 2956 is quoted in full in petitioner's original petition (R. 4), the pith of which reads:

> "Art. 2956. Absentee Voting. Any qualified elector, as defined by the laws of this State, who expects to be absent from the County of his or her residence on the day of election may vote subject to the following conditions, to wit: At some time, not more than twenty (20) days nor less than three (3) days prior to the date of such election, such elector shall make his or her personal appearance before the Clerk of the County of his or her residence and shall deliver to such Clerk his or her poll tax receipt or exemption certificate entitling him or her to vote at such election, and said Clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election .... The provisions of this article shall apply to all elections, including General, Special, and Primary elections."

The petitioner was on said July 9, 1934, a "qualified elector, as defined by the laws of" Texas; was a member of and believer in the tenets of the Democratic Party; expected to be absent from his county on said election day; made his personal appearance before the respondent and delivered to respondent petitioner's poll tax receipt entitling petitioner to vote in the election involved in this case; but respondent refused to deliver to petitioner a ballot or to permit petitioner to vote in said election, respondent giving as his sole reason and justification the fact that petitioner was a Negro, and that under the above quoted resolution of the State Democratic Convention of Texas and under instructions from the County Democratic Executive Committee of Harris County, Texas, petitioner was ineligible to vote in said election, solely and only because petitioner was a member of the Negro race.

Instant Suit Brought

Fifth. Feeling himself aggrieved and damaged by his said disenfranchisement in the sum of Ten Dollars (ten times the damages awarded by the jury in *Nixon* v. *Herndon, supra;* ten times the amount agreed as the measure of damages by the parties in *Nixon* v. *Condon, supra;* and twice the amount of damages awarded upon a trial to the United States District Judge without a jury in *Nixon* v. *McCann,* No. 1660 Law, U. S. District Court, Western District of Texas, decided February 7, 1934, but not officially reported; twice the amount of damages awarded by the jury in *Bliley* v. *West,* 42 F. (2d) 101;—see certified copies of judgments in *Nixon Cases* printed herewith as Appendices 1, 2, and 3), petitioner, on September 10, 1934, brought suit for ten dollars ($10.00) damages in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. Because of the amount involved, the Justice Court was the only Texas Court having jurisdiction; and no appeal lies from the judgment in such cases. Article 5, Section 19, Constitution of Texas; Articles 2385 and 2454, Revised Civil Statutes of Texas.

Petitioner filed a petition in said action in the Justice Court (R. 1) setting out the matters and things set forth above, and in addition thereto, the following pertinent facts:

1. That the petitioner, R. R. Grovey, is and was on July 9, 1934, a natural born citizen and resident of the United States and the State of Texas, was 44 years of age, a member of the Negro race, had resided in Harris County, Texas, for 18 years and in his voting precinct No. 85 for 4 years, next preceding the holding of the statutory Democratic primary election involved in this case, had paid his poll tax as required by law and held his official receipt therefor, was a duly qualified elector under the laws of the United States and the State of Texas, was subject to none of the disqualifications for voting provided for under the constitution and laws of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

2. That Articles 3101 and 3102 of the Revised Civil Statutes of Texas (quoted in the petition, R. 2) required the holding of a statutory Democratic primary election on July 28, 1934; that said election was held pursuant to the mandatory requirements of said articles, and that petitioner had a legal right to vote therein, which right was protected by the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 3).

3. That Article 3107 of the Revised Civil Statutes of Texas (construed by this Court in *Nixon* v. *Condon, supra*) provides in part that "no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That the immunities thus granted to the classifications of "former political views or affiliations" and "membership or non-membership in organizations other than the political party" have been held valid by the Supreme Court of Texas in *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515; and that the failure of the Supreme Court of Texas to extend the same immunity to the classification of "race and color" in the *Bell* v. *Hill Case, supra*, was a denial to petitioner and all other qualified Negro voters of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment and an abridgement of petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 9-10).

That the decision of the Supreme Court of Texas in the *Bell* v. *Hill Case* was the culmination of a consistent course of statutory enactments and judicial decisions, since the original passage of the statutory primary election laws of Texas, under which the State of Texas has deprived the managers of said elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of Texas, except in the one instance where the managers of such elections have been authorized and permitted and protected by said "course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections." (R. 11)

4. "That the Democratic Party is a national organization, and that the Democratic Party has not passed any rule or resolution or order excluding Negroes, and has not authorized any of its agencies or branches to pass any resolution, rule, or order excluding Negroes, or forbidding Negroes from becoming members of the Democratic Party, and that no State convention of the Democratic Party has the power by virtue of its being to pass any such rule, resolution, or order, and that the Democratic Party has never conferred power upon the State Democratic Convention of Texas to pass any such resolution, rule, or order." (R. 11).

5. That the respondent, Albert Townsend, is a State officer of the State of Texas, who exercises only functions delegated to him by the laws of the State and whose compensation and salary are paid out of the tax money to which petitioner has contributed and is required to contribute by the laws of the State of Texas (R. 12).

6. That the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, are agencies of government within the meaning of the Constitution of the United States and *Nixon* v. *Condon, supra* (R. 12).

Demurrer to Petition

Sixth. The respondent, Albert Townsend, filed his demurrer to petitioner's petition as follows: "The defendant demurs generally to the plaintiff's petition and says it is insufficient in law and states no cause of action . . . ." (R. 13.)

Decision of Court

Seventh. On September 24, 1934, the Justice Court entered its judgment sustaining the general demurrer and dismissing petitioner's petition, and entering judgment for respondent (R. 14).

Motion for New Trial

Eighth. On September 25, 1934, petitioner filed his motion for a new trial in which he urged upon the Justice Court in detail that said judgment denied petitioner the due process of law and equal protection of laws guaranteed by the Fourteenth Amendment and abridged petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 15).

No Appeal Permitted

Ninth. The amount involved being less than $20.00 no appeal or review is permitted (either as a matter of right or as a matter of discretion) to any higher State court of the State of Texas.

Certiorari

Tenth. On January 14, 1935, this Court granted a writ of Certiorari to review the judgment of the court below.

Summary of Argument

Point Number One

The election involved in this case was an election which was held

under statutory compulsion, which was wholly statutory, and in which those charged with its management have been deprived by Texas statutes and judicial decisions of all power to fix qualifications and tests for participation therein, inconsistent with the qualifications and tests fixed by Texas laws; except in the one instance where such managers have been "guaranteed" the power to deny Negroes the right to participate in such elections. In an election of this character the State of Texas cannot annul the franchise guaranties of the 14th and 15th Amendments to the Federal Constitution by the simple device of labels. Its name is the name of the Democratic Party, but the voice of the election involved in this case is the voice of the State.

Point Number Two

Nixon v. *Herndon*, 276 U. S. 536, established that in Texas a qualified Negro citizen has the same civil right to vote in the election labeled the statutory Democratic primary election as he does in the election labeled the general election.

Point Number Three

Petitioner had a right created by the Constitution of the United States to vote for United States Representative and United States Senator in the election involved in this case.

Point Number Four

Petitioner had a right, created by the 15th Amendment to the Constitution of the United States, to "an exemption from discrimination in the exercise of the elective franchise" in the election involved in this case, "on account of race, color or previous condition of servitude;" and the 15th Amendment by its own self-operating force struck down race and color as a barrier to voting in the election involved in this case, leaving petitioner with the same right to vote in that election which was possessed by qualified voters who were not Negroes.

Point Number Five

The State Democratic Convention of Texas, which passed the resolution involved in this case, was a creature of statute, and as such was an agency of the State, which could not constitutionally do what its creator was prohibited by the Constitution of the United

States from doing.

Point Number Six

Petitioner believes that there is not properly involved in this case any question of party membership; but that, if there is, the Democratic Party, as was true in *Nixon* v. *Condon*, 286 U. S. 73, has not yet spoken that Negroes may not be Democrats.

Point Number Seven

Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Statutes of Texas, as upheld by the Supreme Court of Texas in the case of *Love* v. *Wilcox*, 28 S. W. (2d) 515.

ARGUMENT

Point Number One

The election involved in this case is an election which was held under statutory compulsion, which was wholly statutory, and in which those charged with its management have been deprived by Texas statutes and judicial decisions of all power to fix qualifications and tests for participation therin, inconsistent with the qualifications and tests fixed by Texas laws; except in the one instance where such managers have been "guaranteed" the power to deny Negroes the right to participate in such election. In an election of this character the State of Texas cannot annul the franchise guaranties of the 14th and 15th Amendments to the Federal Constitution by the simple device of labels. Its name is the name of the Democratic Party, but the voice of the election involved in this case is the voice of the State.

No principle is more firmly settled by the decisions of this Court than the doctrine that, in determining whether constitutional guaranties have been violated, this court will look "to substance, not to form," *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234-235;

and that states cannot escape the paramount authority of the Constitution of the United States by tacking upon that which is constitutionally prohibited the label of that which under certain circumstances this Court may find to be constitutionally permissible.

Thus, when a Governor of Texas sought to escape from constitutional restraint by masking his conduct behind the label "martial law," this Court held in *Sterling* v. *Constantin*, 287 U. S. 378, 397, that "There is no such avenue of escape from the paramount authority of the Federal Constitution."

Likewise, when in *Life & Casualty Insurance Co. of Tennessee* v. *McCray*, 291 U. S. 566, 573, this Court was urged to determine the validity of a statutory exaction by the label "penalty," it was held that "the measure, not the name controls."

So, also, if the election involved in the case at bar is measured by its nature instead of its name, it will be found to be no different in statutory substance from the election labeled "general election," which followed on November 6, 1934. A comparison between the two elections will demonstrate this to be true.

Election Labeled "GENERAL ELECTION" and Held November 6, 1934	*Election Labeled "PRIMARY ELECTION" Held July 28, 1934.*
1. Held under compulsion of Article 2930 of Revised Civil Statutes of Texas, 1925.	1. Held under compulsion of Article 3101 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 2930.	2. Date fixed by Article 3102.
3. Article 2930 fixes time of day for holding election.	3. Article 2930 fixes time of day for holding election.

4. Article 2939 requires that all election officials shall be qualified voters.	4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in "statutory primary election."	5. Article 2955 fixes same qualifications for voting in this election as in election labeled "general election."
6. Article 2956 (Absentee Voting) is same for this election as for "statutory primary election."	6. Article 2956 (Absentee Voting) is the same for this election as for general election.
7. Article 2978 provides that only Official Ballot shall be used.	7. Article 2978 provides that only Official Ballot shall be used.
8. Articles 2980-2981 provide form of ballot and how to mark ballot.	8. Articles 3109, 3110 provide form and contents of ballot. Also Art. 3109 fixes method of marking ballot.
9. Article 2984 fixes the number of ballots to be provided.	9. Article 3109 fixes number of ballots to be provided.
10. Articles 2986, 2987 and 2990	10. Article 3120 provides that

provide for voting booths, guard rails, and ballot boxes for this election.

voting booths, guard rails, and ballot boxes of "general election" may be used in compulsory statutory primary election.

11. Article 2998 fixes oath to be taken by officials in this election.

11. Article 3104 requires officials of this election to take same oath as officials of "general election."

12. Power of judges fixed by Article 3002 as follows:

"Judges of election are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the district judge to enforce order and keep the peace. He may appoint special peace officers to act as such during the election and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, or such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after

12. Power of judges fixed by Article 3105 as follows:

"Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, *as judges of general elections are authorized and required to do.* Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or

the election, when his case may be examined into before some magistrate, to whom the presiding judge shall report it; but the party arrested shall first be permitted to vote, if entitled to do so unless he is drunk from the use of intoxicating liquor, then he shall not be permitted to vote until he is sober."	other mode of conveyance, except as permitted by this title." (Italics ours.)
13. Articles 3003 to 3025 contain elaborate provisions for securing purity of the ballot box.	13. Article 3122 provides: "The same precautions required by law to secure the purity of the ballot box in general elections, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections."
14. Article 3028 requires delivery of sealed ballot boxes containing ballots, etc. to County Clerk after this election.	14. Article 3128 requires delivery of sealed ballot boxes containing ballots, etc. to County Clerk after this election.
15. Article 3041 provides for contest of this election before district court.	15. Article 3146 provides for contest of this election before district court.

So far as statutory creation is concerned it is manifest that the only difference between these two elections is a difference in name.

So far as judicial interpretation by the appellate courts of Texas is concerned, petitioner believes that an analysis of the cases shows only the difference of the Negro vote.

(a) The clearest contrast is between the cases of *Love* v. *Wilcox*, 28 S. W. (2d) 515, and *Bell* v. *Hill*, 74 S. W. (2d) 113, decided by the Supreme Court of Texas.

In the *Love Case*, when the question of the franchise rights of Negroes was not involved, the statutory primary election was a matter of great public interest and the court found in Sections 2 and 27 of Article 1 (Bill of Rights) of the Texas Constitution authority for statutes conferring original jurisdiction upon the Supreme Court of Texas to use its extraordinary writ of mandamus to prohibit the establishment of past party affiliations (the historical and traditional test of party loyalty) or membership or non membership in organizations (like the Ku Klux Klan) other than the political party, as qualifications or tests for participation in the statutory primary elections. The Supreme Court of Texas held in the *Love Case* (pp. 520, 525):

> "Whenever the uncontradicted facts show that a relator has the right to exact performance by *public functionaries* of duties imposed on them by law, his appropriate remedy is the writ of mandamus. *No questions could arise of wider public interest or of graver importance to the state* than those involving abridgement of *rights of citizens to participate in government* through the selection of those who may become public officials by means of party nominations." (Italics ours.)
>
> "Moreover, the language of article 3107 is fairly susceptible of no other interpretation than that the Legislature intended the same qualifications to be prescribed by the State Committee for *all* participating in a party primary, *whether as voters or candidates*, and further that the same qualifications must be prescribed for all candidates." (First Italics theirs; second Italics ours.)

In the *Bell Case*, when the rights of Negroes to vote come into the picture, the managers of the statutory primary election are no longer "public functionaries" having duties "imposed upon them

by law;" the questions involved are no longer "of wider public interest or of graver importance to the state;" Article 3107 no longer requires the fixing of "the same qualifications for . . . *all* . . . whether as voters or candidates;" and when it was suggested that the levelling powers of the 14th Amendment, as announced by this Court in *Nixon* v. *Condon, supra*, might compel equal treatment of Negroes, the Supreme Court of Texas, while expressly disagreeing with *Nixon* v. *Condon*, held that whether the view of the Supreme Court of the United States should avail "is not a matter of any particular consequence here;" since Article 3107 would then be plainly void as being in violation of the same provisions of the Texas Constitution (Sections 2 and 27 of Article 1—Bill of Rights) in which in the *Love Case* the Supreme Court of Texas found authority for statutes which authorized it to use its extraordinary writ of mandamus to prohibit the fixing of past party affiliations or membership or non-membership in organizations other than the political party as tests for voting in the statutory primary election.

In other words, if the classification sought to be established is based upon race and color, Sections 2 and 27 of Article 1 of the Texas Constitution "guarantee" it; but if past party affiliations (the traditional test of party loyalty) or membership or non-membership in organizations other than the political party is the basis of the classification, then Sections 2 and 27 of Article 1 of the Texas Constitution forbid it.

(b) In *Koy* v. *Schneider*, 218 S. W. 479, the Supreme Court of Texas had before it a statute which the court described as follows (p. 479): "The act of the Legislature confers the right to vote on women possessing the qualifications, save of sex, of electors under the Constitution and laws of the state, at any and all primary elections or nominating conventions to be held under the laws of the state, and requires each woman offering to vote in any primary election or convention, after January 1, 1919, to comply with all provisions of our laws requiring and permitting voting on payment of poll taxes."

The question before the Supreme Court of Texas was whether the word "election" as used in Section 2 of Article 6 (the suffrage section) of the Constitution of the State (adopted prior to the creation of the statutory primary election) was broad enough to include the statutory primary election. If so, then Negroes would

be eligible; if not, then the legislature had power to confer the right to vote upon women. The court held that (p. 483):

> "There being no constitutional prohibition, it follows that the Legislature was free to extend the privilege of participation in party primaries and conventions to women possessing the qualifications, save sex, of electors under our Constitution and laws. . . ."

Chief Justice Phillips in his dissent was pressing the contention that *Ashford* v. *Goodwin*, 131 S. W. 535, was controlling, in that there it had been held that the word "election" in Section 8 of Article 5 of the Texas Constitution (adopted prior to the creation of the statutory primary election and conferring jurisdiction on the district courts to hear contested elections) was broad enough to include the statutory primary election. The Supreme Court of Texas disposed of *Ashford* v. *Goodwin* as follows:

> "That decision can be rightly understood by bearing in mind its underlying principle, announced by the court, per Judge Brown, immediately after the statement of the case in these words:
>
> 'When the Legislature passed that act, they must, in the discharge of their duty, have determined that the power to so enact was conferred upon that body by the language we have quoted above from section 8 of article 5 of the Constitution as amended. The Legislature having determined that the power was granted to that body to pass the law, this court must sustain it unless its invalidity be apparent beyond a reasonable doubt.'
>
> "Here, the Legislature necessarily determined that Section 2 of Article 6 left them free to fix the qualifications of participants in primaries, and, since we cannot say that the legislative determination was wrong beyond a reasonable doubt, we must sustain it."

(c) In *Briscoe* v. *Boyle*, 286 S. W. 275 (cited with approval in *Love* v. *Wilcox*, *supra*, and in *County Democratic Executive Committee* v. *Booker*, *infra*), the Court of Civil Appeals at San Antonio held that "In this State the qualifications of persons entitled to vote in general elections are fixed by the Constitution, and, except those excluded by express restrictive provisions in the statutes (only

Negroes were at that time excluded by such express provisions in the statutes), all persons qualified to vote in general elections are entitled to participate in party primary elections." In *County Dem. Ex. Committee* v. *Booker*, 53 S. W. (2d) 123, the Court of Civil Appeals at San Antonio held that the exclusion of Negroes from participation in the statutory Democratic primary elections is "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*."

(d) In *Clancy* v. *Clough*, 30 S. W. (2d) 569, the Court of Civil Appeals at Galveston (the Texas Judicial District in which the case at bar arose) affirmed a judgment of the trial court enjoining the defendants "from placing upon the official ballot any pledge other than that prescribed by the statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." In *White* v. *Lubbock*, 30 S. W. (2d) 722, the Court of Civil Appeals at Galveston, with more consistency, held that the resolution stricken down by this Court in *Nixon* v. *Condon*, *supra*, was "a valid exercise" of the "party's inherent power."

(e) In *Hamilton* v. *Monroe*, 287 S. W. 304, 305, the Court of Civil Appeals at Waco said:

> "The regulation of party nominations is entirely statutory. The Supreme Court of this State has held that the only rights candidates for party nomination in primary election contests have are those given by the statutes."

(f) In *Gilmore* v. *Waples*, 188 S. W. 1037, 1040, the Supreme Court of Texas asked:

> "For what purpose and to what end, it may appropriately be inquired, have the various statutes in relation to party nominations been enacted in this State if the rights and duties therein defined and the matters they purport to govern still present mere political questions, to be settled alone by party law and in the party forum, and are therefore beyond the cognizance of the courts?"

(g) In *Hamilton* v. *Davis*, 217 S. W. 431, 434, (cited with approval by the Supreme Court of Texas in *Koy v. Schneider*, *supra*), the Court of Civil Appeals at Austin said:

> "If the Legislature can prescribe the qualifications of voters in an election for officers to fill offices created by it, but not

by the Constitution, it can assuredly do so in primary elections, *which are solely the creatures of the statute . . .*" (Italics ours)

The Legislature has, by Articles 2955 and 2956, Revised Civil Statutes of Texas, 1925, prescribed the qualifications of voters in the statutory primary elections, the pith of which sections is as follows:

Art. 2955. "Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector.....; provided that any voter who is subject to pay a poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this state and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election . . . *The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections.*" (Italics ours)

Art. 2956—"*Any qualified elector, as defined by the laws of this state,* who expects to be absent from the county of his or her residence on the day of election may vote subject to the following conditions, to wit;" (Italics ours.) This is the Absentee Voting Section, is the section involved in this case, and is quoted in full in the record at page 4).

These statutory qualifications have been respected in Texas in every case, except where Negroes offered to vote. For instance, the Attorney-General of Texas handed down an opinion during the summer of 1934, holding that Mexicans had a right to vote in the election involved in this case. He also handed down an opinion holding that Negroes had no such right. See *Bell* v. *Hill*, 74 S. W. (2d) 113, 120. The reason why the Attorney General of Texas should be defining the right to vote in the election involved in this case,—if it is the election of a private association,—is the simple fact that it is not the election of a private association, but is "solely the creature of the statute." *Hamilton* v. *Davis, supra.*

Besides, the election involved in this case, though bearing the name of the sham battle, was in fact the real battle; and the election

labeled the real battle was in fact the sham battle. It was so alleged by the petitioner below (R. 11). It is a matter of common and general knowledge of which this Court may take judicial notice. *Muller* v. *Oregon*, 208 U. S. 412, 421. It is commonly and generally known that the total number of ballots cast in the election involved in this case for Governor, for instance, was 994,003. (Houston Chronicle, August 12, 1934, p. 15), while the total number of ballots cast in the election labeled "general election," for governor was 437,077 (House Journal, 44th Tex. Leg., Reg. Sess., Jan. 11, 1935, p. 64). It is also commonly and generally known that, since the creation of the statutory primary elections of Texas, the statutory Democratic primary elections have always been the real battles and the general elections the sham battles. It is this commonly and generally known fact which explains why Old Article 3107 of the Revised Civil Statutes of Texas, stricken down by this Court in *Nixon* v. *Herndon*, *supra*, only sought to disenfranchise Negroes in the statutory Democratic primary election.

Petitioner does not question the right of the Texas appellate courts to construe the statutory primary election laws of the state. But when those laws, as said by this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, are construed "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," then petitioner feels justified in asking this Court to measure the election involved in this case, not by what the state may call it, but by what it is in fact—*a creature of the statute*—and to enforce against the election involved in this case not merely the constitutional guaranties which apply to private associations, but the constitutional guaranties which are vouchsafed in an election of the state. What are those guaranties?

Point Number Two

Nixon v. Herndon, 276 U. S. 536, established that in Texas a qualified Negro citizen has the same civil right to vote in the election labeled the statutory Democratic primary election as he does in the election labeled the general election.

Mr. Justice Holmes, rendering the opinion of this Court, said (p. 540) that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote

at the primary election that may determine the final result."

The Circuit Court of Appeals for the Fifth Circuit, in *Nixon* v. *Condon*, 49 Fed. (2d) 1012, 1013, expressed the same view of *Nixon* v. *Herndon*, *supra*:

> "It is of course to be conceeded, since the decision in *Nixon* v. *Herndon*, *supra*, that the right of a qualified citizen to vote extends to primary elections as well as to general elections."

The reason that allows a recovery for denying a vote at a final or general election is not that the defendant, who may deny the vote, is a state officer, but that, because of the nature of the election (not its name), plaintiff has a legal civil right to vote in the election and the defendant has a legal duty not to deny the vote. Substantial allegations of action by the state may, under certain circumstances, be necessary to give the Federal Courts jurisdiction to redress the wrong, but the presence or the absence of the state as a party to the act of denying the vote does not determine the right of the plaintiff or the duty of the defendant. Both of these are determined by the nature of the election. As was said by this Court in the *Civil Rights Cases*, 109 U. S. 3, 17:

> "An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

Nixon v. *Herndon*, *supra*, also established that the Fourteenth Amendment prohibits the state from lending its protection to the deprivation of that civil right to vote in the statutory Democratic primary elections of Texas, and a Texas statute seeking to do this was stricken down as being unconstitutional.

That the civil right to vote in the statutory Democratic primary election involved in this case has been denied will not and cannot be questioned. Petitioner so alleged (R. 7) and respondent's general demurrer so admits (R. 13).

That the state of Texas has participated in and given its protection to the deprivation of petitioner's civil right to vote in the statutory Democratic primary election involved in this case is likewise clear.

(a) It cannot be disputed that the respondent, who denied the vote, was a state officer. His office of County Clerk is created by the Texas constitution (Art. 5, sec. 20). His powers and duties are fixed by statute. Chapter Two, Title 41, Articles 1935-1948, Revised Civil Statutes of Texas. His compensation is fixed by statute and comes out of public funds. Articles 3883, 3932, and 1644 of the Revised Civil Statutes of Texas. His powers and duties as the sole conductor of absentee voting in Harris County, Texas, are wholly fixed by statute. Article 2956 of the Revised Civil Statutes of Texas. Indeed, absentee voting was unknown in Texas prior to its creation by statute. See *Sterling* v. *Ferguson* (Tex. Sup.), 53 S. W. (2d) 753, 760.

(b) The judgment of the court below denying to petitioner, on account of race and color alone, redress for the deprivation of his civil right to vote in the statutory Democratic primary election involved in this case is just as much a protection of the deprivation by the State of Texas as was the statute stricken down by this Court in *Nixon* v. *Herndon, supra.*

That state judicial decisions are as much within the prohibition of the Fourteenth and Fifteenth Amendments as legislative enactments has been well settled by this Court. *Brickerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, 680 (and cases cited).

(c) The State of Texas has further given its protection to the deprivation of petitioner's civil right to vote by the decision of the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, which holds that the deprivation is protected and guaranteed by the First Amendment to the Constitution of the United States and Sections 2 and 27 of Article 1 of the Constitution of Texas (pp. 119, 122).

Point Number Three

Petitioner had a right created by the Constitution of the United States to vote for United States Representative and United States Senator in the election involved in this case.

The election was a state election, and the so-called nominations were as a matter of fact equivalent to elections. See Point Number One, supra.

Section 2 of Article I of the Constitution of the United States provides in its first paragraph as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for the most numerous branch of the State Legislature."

The 17th Amendment to the Constitution of the United States provides in its first paragraph as follows:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

It is admitted that petitioner had the requisite qualifications (R. 1, 13), and it has been settled by this Court, in *Wiley* v. *Sinkler*, 179, U. S. 58, 62, that

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, *but has it foundation in the Constitution of the United States.*" (Italics ours). See also *Ex Parte Yarbrough*, 110 U. S. 651, and *Swafford* v. *Templeton*, 185 U. S. 487.

What, then, is meant when the above quoted constitutional provisions say that United States Senators and Representatives shall be elected "by the people" of the several States?

Under the familiar rule, of course, resort must be had "to substance, not to form;" and the controlling principle is that laid down by this Court in *Ex Parte Yarbrough*, *supra* (p. 666), where it is said:

> "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the *free choice of the people*, as that the original form of it should be." (Italics ours).

Can it be said that the members of Congress chosen in the election involved in this case were "the free choice of the people" of Texas?

That petitioner had no real part in the choice is beyond question.

If, then, a state provides by statute for two voting contests for the offices of United States Representatives and Senators; and if in fact one contest is equivalent to election while the other is a mere formality; and if Negroes are, with the approval of the courts of the State, denied the right to vote in the real contest; can it be said that, by naming the real contest "statutory primary election" and by naming the formal contest "general election," the state has satisfied the requirements of Section 2 of Article I and the 17th Amendment to the Constitution of the United States, which say that the members of Congress shall be elected "by the people" of the state?

If so, then, so far as Negroes are concerned, "the right to vote for members of the Congress of the United States," which "has its foundation in the Constitution of the United States," is a mere empty phrase in Texas.

The precise question here raised has not heretofore been determined by this Court. But petitioner believes, as said by this Court in *Sterling* v. *Constantin*, *supra*, that "There is no such avenue of escape from the paramount authority of the Federal Constitution."

The purpose of Section 2 of Article I and the 17th Amendment to the Constitution of the United States is obviously to guarantee to every citizen of the United States, who has the qualifications of an elector of the most numerous branch of the legislature, a real voice in the selection of the United States Congress. Whether this purpose has been achieved in any given case is, in the opinion of petitioner, purely a Federal question. That purpose cannot be met by a resort to names and labels.

True it is that Section 4 of Article I of the Constitution (before this Court in Newberry v. United States, 256 U. S. 232) provides that,

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

But this section does not purport to take away from or to give the states power to diminish or to render practically without effect or value the right of citizens to vote for members of the Congress,

which is created by the Constitution. If the state did have such power, then, instead of having "its foundation in the Constitution of the United States," the right to vote for members of the Congress of the United States would have its foundation in the uncontrolled whim of the state legislature.

In fixing "the times, places and manner of holding elections for Senators and Representatives" it seems to the petitioner obvious that "the times, places and manner" selected must in fact offer to every qualified citizen an opportunity for a reasonably fair voice in helping to fill these offices. When the state selects "times, places and manner" for these elections which either fail to provide or prevent such a reasonably fair voice in the choices to be made, then, in a proper proceeding by a citizen whose Federal right has thus been rendered impotent, the matter is one for judicial inquiry; and "To such a case the Federal judicial power extends . . . . . " *Sterling* v. *Constantin, supra,* (p. 398).

> "In determining what is due process of law regard must be had to substance, not to form." *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234-235.

Point Number Four

Petitioner had a right, created by the 15th Amendment to the Constitution of the United States, to "an exemption from discrimination in the exercise of the elective franchise" in the election involved in this case, "on account of race, color or previous condition of servitude;" and the 15th Amendment by its own self-operating force struck down race and color as a barrier to voting in the election involved in this case, leaving petitioner with the same right to vote in that election which was possessed by qualified voters who were not Negroes.

United States v. *Reese,* 92 U. S. 214, *Ex Parte Yarbrough,* 110 U. S. 651, and *Neal* v. *Delaware,* 103 U. S. 370, are cited in support of the first clause of this proposition, and *Guinn* v. *United States,* 238 U. S. 347, and *Myers* v. *Anderson,* 238 U. S. 368, are cited in support of the second clause.

(a) In *Ex Parte Yarbrough, supra,* (p. 665) it is said:

> "In the case of *U. S.* v. *Reese* . . . . this Court said in regard to the 15th Amendment, that 'It has invested the citizens of the United States with a new constitutional right . . . That

right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.'"

States may not discriminate against this new constitutional right created by the 15th Amendment. "A state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis and San Francisco Railway Co.*, 292 U. S. 230, 234.

Petitioner believes it to be clear that the State of Texas has discriminated against petitioner's "new constitutional right" created by the 15th Amendment. One instance of such discrimination by the State of Texas lies in the following:

By Article 3107 of the Revised Civil Statutes of Texas, 1925, as amended, the State of Texas created certain state exemptions from discrimination in the exercise of the elective franchise in the election involved in this case, as follows:

> "Provided that no person shall ever be denied the right to participate in a primary in this state because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

In *Love* v. *Wilcox*, 28 S. W. (2d) 515, the Supreme Court of Texas held that these state exemptions were valid and enforceable in the statutory Democratic primary elections of the State.

Petitioner respectfully submits that to protect the state exemptions while refusing to protect the Federal exemption, is a discrimination against a right arising under the 15th Amendment, and is within the constitutional prohibition announced by this Court in the *McKnett Case, supra.*

This discrimination is believed by petitioner to deny him the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, in that, manifestly, the classification of race and color is not treated by the State of Texas with the same equality of treatment as the classifications of past party affiliations and membership or non-membership in organizations other than the political party.

(b) Section 1 of the 15th Amendment provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Guinn v. *United States* and *Myers* v. *Anderson, supra,* established beyond any further question the principle that this section of the 15th Amendment is self-enacting and that by its own self-operating force it strikes down the barriers of race and color wherever they have been set up in connection with voting to which the Amendment applies.

The limits of the occasions for voting to which the 15th Amendment applies have never been set by this Court. Mr. Chief Justice White makes no mention of what these limits are in his definition of the *"Operation and Effect of the 15th Amendment"* (*Guinn* v. *United States, supra,* p. 361). But in *Myers* v. *Anderson, supra,* when it was contended that "in any event there could not be liability under the 15th Amendment for having deprived of the right to vote at a *municipal election.*" (Italics ours), he dismissed the contention under the authority of the *Guinn Case* as being wholly without merit.

Manifestly, of course, it is not every occasion for voting that is reached by the intendment of the 15th Amendment. But the attitude of this Court in *Myers* v. *Anderson, supra,* toward a contention to set arbitrary limits to the occasions covered by the words "to vote" in the 15th Amendment, suggests to petitioner that the true rule is this,

That wherever in substantial relation to the selection of persons to fill offices of government, voting is going on under either the mandate or authority of the state, there the 15th Amendment is present to strike down by its own self-operating power any barriers of race and color which may be set up to condition the "right to vote" protected by that Amendment.

As to the substantial relation of the Texas statutory Democratic primary elections to the selection of persons to fill offices of government this Court in *Nixon* v. *Condon, supra,* (p. 88), said of the managers of such elections the following:

> "They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly."

Petitioner believes that the rule suggested by him is a reasonable

construction. The history of the 15th Amendment discloses that its purpose was to insure to every citizen a just and fair voice in the selection of public officials in the various states. The broad expressions "to vote" and "denied or abridged" seem to indicate an intent to use language suited to the purpose.

It would hardly be stretching this language to hold that voting in a "statutory primary election" which is entirely a creature of the state, *Hamilton v. Davis, supra*; in which the State has by statute fixed qualifications for voting (Articles 2955, 2956, supra) that have been respected except where Negroes offered to vote; and which is in fact the real election to fill the offices involved, is an occasion for voting in which the 15th Amendment strikes down barriers of race and color.

Nor, in the opinion of petitioner, would it be unreasonable to say that the words "denied or abridged" are broad enough to apply when, as here, the State (1) has failed to strike down those barriers of race and color in an election wholly created by it; (2) has held that the power to maintain those barriers is "guaranteed" by provisions of the State constitution—*Bell v. Hill, supra*; and (3) has set up State exemptions from other barriers to voting, which are held valid and enforceable—*Love v. Wilcox, supra*—while refusing to enforce the exemption from the barrier of race and color which is created by the 15th Amendment.

Petitioner feels it would not do violence even to the ordinary meaning of the word "abridged" to hold that such conduct of the State of Texas in connection with the statutory primary election is in fact an abridgement (a real "shortening," "lessening," "diminishing," "curtailing"—See Webster's Dictionary—a real obstacle to the value and effectiveness) of the right to vote in the so-called general election.

Point Number Five

The State Democratic Convention of Texas, which passed the resolution involved in this case, was a creature of statute, and as such was an agency of the State, which could not constitutionally do what its creator was prohibited by the Constitution of the United States from doing.

The convention was created by Article 3167 of the Revised Civil Statutes of Texas, 1925, which, as said by United States District

Judge Kennerly in *White v. The County Democratic Executive Committee*, 60 Fed. (2d) 973, "fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein."

No truer or clearer statement of the historical and factual aspects of the question involved under this point has come to petitioner's notice than that given by Judge Kennerly in the *White Case, supra*, where (p. 974) it is said concerning the resolution and the convention involved in this case:

> "Respondents, however, insist that the Democratic Party's power with respect to and its convention's power to pass such resolution, are inherent, possessed long prior to the enactment of article 3107, and in no manner derived from the State of Texas. That this was true prior to the enactment of laws in Texas regulating the political parties, etc., there is little, if any, doubt. That it not true now is certain. For a period of more than twenty-five years, the Democratic Party in Texas has, from time to time, accepted grants of power from the State, surrendered its own inherent powers, and caused to be passed laws abridging its inherent powers, until, as was said in *Briscoe Boyle* (Tex. Civ. App.) 286 S. W. 275, 276, the party has little or no discretion in the management of its party affairs. Unlike Moses, who refused to be known as the son of Pharaoh's daughter, the Democratic Party in Texas has, over a period of twenty-five years, chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the State.
>
> "It is only necessary to review the history of legislation in Texas, respecting political parties, Acts of 28th Legislature (1903), c. 101, secs. 82 to 107, p. 148, 12 Gammel's Laws of Texas; Acts of 29th Legislature (1905), 1st Called Sess., c. 11, secs. 102 to 195, p. 543, 12 Gammel's Laws of Texas; Texas Revised Civil Statutes 1911, articles 3084 to 3175 and amendments; Texas Revised Civil Statutes 1925, articles 3100 to 3173 and amendments (Vernon's Annotated Revised Civil Statutes of Texas, articles 3100 to 3173), and to review the decisions of the higher courts of Texas, construing such legislation, *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515, 523;

Briscoe v. *Boyle* (Tex. Civ. App.) 286 S. W. 275; *Koy* v. *Schneider*, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880; *Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178; *Walker v. Hopping*, (Tex. Civ. App.) 226 S. W. 146; *Dewees v. Stevens*, 105 Tex. 356, 150 S. W. 589; *Mays v. Cobb*, 100 Tex. 131, 96 S. W. 1079; Gilmore v. Waples, 108 Tex. 167, 188 S. W. 1037; *Ashford v. Goodwin*, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913 A, 699; *Morris v. Mims*, (Tex. Civ. App.) 224 S. W. 587; *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917 A, 253; *Hamilton* v. *Monroe*, 116 Tex. 153, 287 S. W. 306; *Nicholson v. Scurry*, 119, Tex. 250, 28 S. W. (2d) 512; *Holzschuber v. Wurzbach* (Tex. Civ. App), 286 S. W. 289; *Love v. Buckner* (Tex. Sup.), 49 S. W. (2d) 425, to show this to be true. Add to this the provisions of the present laws, regulating in detail the affairs of political parties, and it becomes unanswerable that the convention passing this resolution was an agency of the state, in the same manner and to the same extent as the state Democratic executive committee. *Nixon v. Condon, supra. The convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein. Article* 3167, *Texas Revised Civil Statutes* 1925." (Italics ours)

In *Bell* v. *Hill, supra*, where the resolution involved in this case was before it, the Supreme Court of Texas did not question the contention that the convention was created by Article 3167 for the purpose of electing delegates to the National Democratic Convention, but held (pp. 121-122) that this purpose was not exclusive, since "There is no limitation contained in Article 3167 with reference to declarations of policy by a State Democratic Convention called for the purpose of electing delegates to a National Convention."

This Court is not concluded, of course, by the decision of the state court that a convention which is created by a statute has both statutory and non-statutory powers, if such decision of the state court has "no fair support."

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on

which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support."

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 744-745.

"An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it." Id. p. 746.

Besides, the Supreme Court of Texas found that the source of the power to pass the resolution was Sections 2 and 27 of Article 1 of the Constitution of the State of Texas (p. 122); and petitioner respectfully submits that the convention being a creature of Article 3167, it is immaterial whether its power came from that article or from the Constitution of Texas, which is the source of the legislature's power to pass Article 3167 itself, creating the convention.

If the Texas Legislature had passed the resolution involved in this case it would have been void. *Nixon v. Herndon, supra.* Petitioner believes that it is no less void when passed by a creature of the Texas Legislature.

Point Number Six

Petitioner believes that there is not properly involved in this case any question of party membership; but that, if there is, the Democratic Party, as was true in Nixon v. Condon. 286 U. S. 73, has not yet spoken that Negroes may not be Democrats.

Nixon v. *Condon* decided three propositions, two Federal questions of law and one question of fact inhering in and necessary to a decision of the Federal questions of law. These three propositions appear from the following three quotations from *Nixon v. Condon, supra*:

(1) "Whatever our couclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which

excluded the petitioner and others of his race, *not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.*" (p. 84, Italics ours).

(2) "The pith of the matter is simply this, that, *when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.* They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere." (p. 88, Italics ours).

(3) "*Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere.* The test is not whether the members of the executive committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (p. 88, Italics ours).

Nixon v. *Condon, supra,* went off on the question of fact that assuming a question of party membership to be involved, no authorized voice of the Democratic Party had yet spoken that Negroes could not be Democrats. Specifically, this Court held as a matter of fact, determined by "the fundamental postulates of party organization," that the Texas State Democratic Executive Committee was not such an authorized voice.

(a) The Democratic Party is a *national political party;* it is not a *State political party.*

A few quotations from Bryce's The American Commonwealth will show beyond question this historical truth.

"What constitutes a party? In America, there is a simple test. Any section of men who nominate candidates of their own for the presidency and vice-presidency of the United States are

deemed a national party. Adopting this test, we shall find that there have lately been two or three *national parties in addition to the Republicans and Democrats.*" Bryce, The American Commonwealth, Vol. 2, p. 41. (Italics ours.)

"We might therefore expect that the State parties would be as distinct from the national parties as are the State Governments from the Federal.

"The contrary has happened. The national parties have engulfed the State parties. The latter have disappeared absolutely as independent bodies, and survive merely as *branches of the national parties*, working each in its own State for the tenets and purposes which a national party professes and seeks to attain." (Id., Vol. 1, p. 572. Italics ours).

"Accordingly, the national parties have complete possession of the field. In every State from Maine to Texas, all State elections for the governorship and other offices are fought on their lines; all State legislatures are divided into members belonging to one or other of them. Every trial of strength in a State election is assumed to presage a similar result in a national election. Every State office is deemed as fitting a reward for services to the national party as for services in State contests. *In fact, the whole machinery is worked exactly as if the State were merely a subdivision of the Union for electoral purposes.*" (Id., p. 574, Italics ours.)

(b) The Democratic Party being a national political party, its supreme voice is the National Democratic Convention.

In *Nixon v. Condon, supra*, this Court said the following (p. 84):

"Whatever inherent power a *State political party* has to determine the content of its membership resides in the State Convention. (Bryce, Modern Democracies, vol. 2, p. 40.)" (Italics ours.)

On page 46 of the same authority (Bryce, Modern Democracies, Vol. 2), writing to the same point with reference to *national political parties*, it is said:

"In the United States the National Convention is the supreme exponent of party doctrine and policy, universally recognized as the party oracle."

Whatever inherent power the Democratic Party has, therefore,

to determine the content of its membership resides, not in forty-eight separate and distinct and different State Democratic conventions, not even in the State Democratic Convention of Texas, as would be true if it were a state political party—but that inherent power, such as exists in America today, resides in the National Democratic Convention.

Any power which the State Democratic Convention of Texas may claim to determine the content of the membership of the Democratic Party must, therefore, necessarily come to it as a matter of delegation from the National Democratic Convention.

Petitioner alleged in his petition below that no power to exclude Negroes had been thus delegated (R. 11). The general demurrer (R. 13), of course, concedes this fact.

Not only has the National Democratic Convention not delegated any such power, but it closed its platform adopted at Chicago on June 27, 1932, (subsequent to May 24, 1932, the date of the resolution of the Texas State Democratic Convention confining membership in the Democratic Party to white people) with these words:

> "To accomplish these purposes and to recover economic liberty we pledge the nominees of this convention and the best effort of a great party whose founder announced the doctrine *which guides us now*, in the hour of our country's need *'equal rights to all, special privileges to none.'*" (World Almanac, 1933, p. 933. Italics ours.)

It is a matter of historical and general knowledge, too, that Negroes were seated in the National Democratic Convention of 1932. It is also significant that the Texas State Democratic Convention which sought by the resolution involved in this case to confine membership in the Democratic Party to the white race, was meeting pursuant to a Texas statute, Article 3167 of the Revised Civil Statutes of Texas, for the express and only purpose of electing delegates to this same National Democratic Convention of 1932. The Supreme Court of Texas states, in *Bell* v. *Hill, supra*, at page 114, that such was the nature and purpose of the State Democratic Convention, which adopted the resolution involved in this case:

> "The petition states in substance, in part, that the respondents are denying or will deny, the relators the right to vote, because of a resolution passed by the State Convention of the Demo-

cratic Party in Texas on May 24, 1932, which reads: 'Be it resolved, that all white citizens of the State who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party, and as such eligible for participation in the primaries.'

"This resolution was passed by the Democratic Convention which met at Houston for the purpose of electing delegates to the National Convention of the Democratic Party."

(c) The Texas State Democratic Convention had no inherent power by virtue of its being to say who may be Democrats and who may not.

"The National Convention is the supreme exponent of party doctrine and policy." Bryce, Modern Democracies, supra. As explained in Bryce's The American Commonwealth, supra, the State convention in Texas is merely a branch or subdivision of the national party, and as such is vested only with the management of the party's affairs in a single state. Except when duly authorized by the supreme voice of the Democratic Party, which it was not in this case, it has no power to exercise the supreme inherent power of the Democratic Party. The reasons were plainly stated by this Court in *Nixon* v. *Condon, supra* (p. 86), as follows:

> "The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence."

Founded by Thomas Jefferson long prior even to the Independence of Texas from Mexico, to say nothing of its statehood, the members of the Democratic Party were already associated together as a party for several decades prior to the creation of the State Democratic Convention of Texas. It follows then that this state convention could not, *ipso facto*, and by its own *ipse dixit*, and merely by receiving the privilege of itself becoming a branch of the Democratic Party, suddenly ascend into possession by virtue of its being of all of the inherent powers of the party, with full authority to rule out even those who let the Texas State Democratic Convention into the Democratic Party.

(*d*) The Texas State Democratic Convention having neither delegated nor inherent power to make race and color a test for membership in the Democratic Party, it is inescapable that whatever power it has in this regard has come to it by virtue of Sections 2 and 27 of the Bill of Rights (Article 1) of the Texas Constitution, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113.

In *Nixon* v. *Condon*, *supra*, this Court held that the State Democratic Executive Committee was an agency of the state in depriving Negroes of their vote because that committee had "excluded petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law."

The same is true of the Texas State Democratic Convention in the case at bar, and that convention is likewise, for the same reason, an agency of the state. Speaking of the convention's power, the Supreme Court of Texas said at page 122 of *Bell* v. *Hill*, *supra*;

> "We are clearly of the opinion that the resolution passed by the Democratic State Convention at Houston was a valid resolution under the power *clearly guaranteed to that body by the Bill of Rights of this State.*" (Italics ours).

In *Nixon* v. *Condon*, *supra*, this Court said of the same power claimed by the State Democratic Executive Committee, the following (p. 85):

> "If the State had not conferred it, there would be hardly color of right to give a basis for its exercise."

Likewise, when the State Democratic Convention of Texas arrogates unto itself this same power without authority from the supreme voice of the Democratic Party, petitioner respectfully submits that "if the State had not" *guaranteed* "it, there would be hardly color of right to give a basis for its exercise."

(e) This Court is not bound by decisions of the Supreme Court and Courts of Civil Appeals of Texas holding that the Texas State Democratic Convention is not an agency of government.

In *Nixon* v. *Condon*, *supra*, this Court said the following (p. 88):

> "Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will

determine for itself. *It is not concluded upon such an inquiry by decisions rendered elsewhere.*" (Italics ours.)

Not only is this ultimate Federal question open for review by this Court, but this Court may also decide for itself every other question which inheres in or is necessary to a proper decision of that Federal question. Such an incidental question is the question whether the Texas State Democratic Convention, as a branch of the Democratic Party, has the inherent power by virtue of its being to make race and color a test of being a Democrat, in the very teeth of a subsequent declaration of the National Democratic Convention—which is said by Bryce to be "the supreme exponent of party doctrine and policy"—dedicating the Democratic Party to a policy of "equal rights to all, special privileges to none."

The general principle of this Court's power and duty to decide for itself such questions has been recently restated by this Court through Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 397, as follows:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise. *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes*

to this Court from a State Court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right." (Italics ours.)

In the more recent case of *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158, 159, this Court said:

"The Supreme Court of the State reached the conclusion that all the cars had their 'taxable situs' at the latter place. As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Besides, the question involved is a question of general law and jurisprudence, and as to such questions this Court has always reserved the right to exercise its own independent judgment.

Swift v. *Tyson*, 10 L. Ed. 865.

Burgess v. *Seligman*, 107 U. S. 20.

Sim v. *Edenborn*, 242 U. S. 131.

See also: *Barclay* v. *Hayes*, 208 Fed. 319.

Point Number Seven

Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in Bell v. Hill, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Statutes of Texas, as upheld by the Supreme Court of Texas in the case of Love v. Wilcox, 28 S. W. (2d) 515.

The denial by the judgment of the court below of this claim of Federal right is not in accord with such decisions of this Court as *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, holding that where one class is favored by exemptions denied to another class under the state law, there must be some reasonable basis for the classification thus

established in order for it to meet the requirements of the equal protection clause of the Fourteenth Amendment.

That race and color cannot be made the basis of such a classification has been well settled by this Court:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."
>
> *Nixon* v. *Herndon*, 273 U. S. 536, 541.

It should be kept in mind also under this point that we are not dealing with a convention formed at the instance or suggestion of private individuals upon their own volition. But, on the contrary, as said by United States District Judge Kennerly in *White v. The County Democratic Executive Committee, supra*, "the convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting, and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925." Moreover, as said by the Supreme Court of Texas in *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760, the election involved is a "statutory primary election."

And it is in such a *statutory* election and to such a *statutory creature* that Sections 2 and 27 of the Texas Bill of Rights guarantee the power to make race and color a qualification and test of voting, while Article 3107 of the Revised Civil Statutes, held valid by the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515, exempts from such discrimination the classifications of past party affiliations (the traditional test of party loyalty) and membership or non-membership in organizations other than the political party.

So, whatever may be the rights and privileges of men whose own minds and volitions bring them together, at a time, and in a manner, and for purposes which they themselves privately decide upon, it is obvious that the public welfare demands a different standard of duty from men who meet together "by virtue of" and "under the terms of" a state statute (see *Bell* v. *Hill, supra*, pp. 114, 121), especially when, as such a creation of a statute they possess "power clearly guaranteed" (see *Bell v. Hill, supra*, p. 122) by the state law to make race and color a test of voting in a "statutory" election.

CONCLUSION

Neither the petitioner, nor the approximately one million Negroes of Texas and ten million Negroes of the South, whose lives and destines will in a very real sense be affected by the decision in this case, asks any special favors at the hands of this Court. In this regard petitioner and the other twelve million Negroes of this nation are willing to stand or fall upon the century and more old principle, announced by Thomas Jefferson in founding the Democratic Party, re-pledged in the platform upon which the American people gave to that party the mandate under which it now is entrusted with the power to administer this Government,—but which is sought to be repudiated and subverted in this case, with the backing, more real than fancied, of the State of Texas,—"equal rights to all, special privileges to none."

All that is asked is that this Court may vouchsafe that the great constitutional guaranties here involved may not be frittered away by devices of names and labels; and to this end that this Court may use the "great restraints of the Constitution" to again "level by its judgment" the barriers of race and color which are disclosed by the record in this case.

Petitioner therefore prays that the judgment below may be reversed, with such instructions as to this Court may seem proper.

Respectfully submitted,

J. Alston Atkins
Carter W. Wesley
Counsel for Petitioner

A. S. Wells
F. S. K. Whittaker
Of Counsel

Appendix 1

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

No. 994. Law.

L. A. NIXON, Plaintiff

vs.

C. C. HERNDON AND CHARLES PORRAS, Defendants

Now, on this 1st day of February, A. D. 1928, at a regular term of this court came on regularly to be heard the above styled and numbered cause. The plaintiff, L. A. Nixon, appeared in person and by counsel and announced ready for trial, and the defendants, C. C. Herndon and Chas. Porras, having been duly and legally served with notice, appeared not, but wholly made default. Whereupon came the jury, composed of Jake Kaufman and eleven other good and lawful men, who were impanelled and sworn to try the issues in said cause, and after having heard the pleadings read, and the evidence submitted by the plaintiff, and the argument of counsel, the court instructed the jury to find the issues in favor of the plaintiff, and the jury returned the following verdict: "We, the jury under instructions of the court, find for the plaintiff L. A. Nixon, against the defendants, C. C. Herndon and Chas. Porras, in the sum of one dollar. Jake Kaufman, Foreman."

And in accordance therewith the Court doth find: That the law and the evidence is with the plaintiff; that the plaintiff was denied the right to vote at the Primary Election on July 26, 1924, for candidates for office upon the Democratic ticket, by the defendants, and that said refusal was a denial to the plaintiff of his rights, and that plaintiff is damaged, and the Court finds his measure of damages to be $1.00.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, L. A. Nixon, have and recover of and from the defendants, C. C. Herndon and Charles Porras, the sum of $1.00, and costs of suit. For which let execution issue.

(Signed) Charles A. Boynton, Judge.

Endorsed: No. 994. In the District Court of the United States Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants. Judgment.

Filed Feb. 1, 1928 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 20, page 108.

UNITED STATES OF AMERICA
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing on 1½ pages, is a true and correct copy of the Judgment in cause No. 994-Law, styled L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk.
(Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

No. 1379. Law.

L. A. NIXON, Plaintiff

vs.

JAMES CONDON AND C. H. KOLLE. Defendants.

This cause coming on to be heard on this the 15th day of October, A. D. 1932, in open court, the plaintiff being present in person and by his attorneys, Fred C. Knollenberg and E. F. Cameron, and the defendants being present by their attorney, Ben R. Howell, and a jury being waived, all matters of fact as well as of law was submitted to the court; and the court having heard the pleadings read, and being fully advised in the premises doth find that the law and the facts are with the plaintiff who is entitled to recover a judgment against the defendants for having been deprived of his right to vote in the Democratic Primaries, thereupon the attorneys announced in court that they had agreed that

a judgment might be rendered for the amount of One Dollar ($1.00).

It is, therefore, ordered, adjudged and decreed that plaintiff, L. A. Nixon, have and recover of and from James Condon and C. H. Kolle the sum of One Dollar ($1.00) and all costs in this cause incurred.

(Signed) Charles A. Boynton, Judge. Form O. K. Howell.

Endorsed: No. 1379—Law. In the District Court of the United States for the Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants. Judgment. Filed October 15, 1932. D. H. Hart, Clerk, by (signed) J. F. Caroline, Deputy. Volume 27, page 391.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1379—Law, styled L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk.
(Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 3

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

October Term, A. D. 1933.

No. 1660. Law.

L. A. NIXON, Plaintiff

v.

GEORGE L. McCANN AND FRANK BRENK, Defendants.

This cause coming on to be heard on this the 7th day of February, A. D. 1934, and all parties having heretofore filed a written stipulation waving a jury and agreeing to submit all matters of

fact, as well as of law, to the court, and in open court announced ready for trial;

And the court having heard the pleadings read and the evidence submitted and the arguments in support thereof, is of the opinion that the law and the evidence is with the plaintiff and he ought to have and recover of and from the defendants his damages against the defendants in the sum of Five Dollars.

It is, therefore, ordered, adjudged, and decreed, that plaintiff have and recover of and from the defendants judgment in the sum of Five Dollars, together with all costs of this proceeding, for which let plaintiff have his execution.

Done, at El Paso, Texas, at this the October Term, A. D. 1933.

(Signed) Charles A. Boynton, Judge. Approved: Ben R. Howell, R. L. Holliday, Atty's. for Def't.

Endorsed: No. 1660—Law. L. A. Nixon vs. George L. McCann and Frank Brenk. Judgment. Filed for record February 7, 1934 (El Paso Division.) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 29, Page 569.

UNITED STATES OF AMERICA,

Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1660—Law, styled L. A. Nixon, plaintiff, vs. George L. McCann and Frank Brenk, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 4

Sections 8, 16, and 19 of Article 5, Constitution of Texas:

"SEC. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all

cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

"The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. (Sec. 8, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"Sec. 16. The County Court shall have original judisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value $200, and not $500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500, and not exceed $1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have

appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed $20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial *de novo* in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

"The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, iodits, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunction, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the County Court, or any other court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law. (Sec. 16, Art. 5, adopted election August 11, 1891;

proclamation September 22, 1891.)"

"SEC. 19. Justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be *ex officio* notaries public. And they shall hold their courts at such times and places as may be provided by law."

Appendix 5

Articles 1906-1911, Revised Civil Statutes of Texas, 1925

Art. 1906. (1705) (1098) (1117) Original jurisdiction.

"The district court shall have original jurisdiction in civil cases of:

"1. Suits in behalf of the State to recover penalties, forfeitures and escheats.

"2. Cases of divorce and dissolution of marriage.

"3. Suits to recover damages for slander or defamation of character.

"4. Suits for the trial of title to land and for the enforcement of liens thereon.

"5. Suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

"6. Suits, complaints or pleas, without regard to any distinction between law and equity, when the matter in controversary (controversy) shall be valued at or amount to five hundred dollars exclusive of interest.

"7. Contested elections. (Const., Art. 5.)"

Art. 1907. (1706) (1099) (1118) Matters of Probate.

"District courts shall have appellate jurisdiction and general

control in probate matters over the county courts, for appointing guardians, granting letters testamentary and of administration, probating wills, settling accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 200; P. D. 1406; Amendment 1891.)"

Art. 1908. (1706) (1099) (1118) Over Commissioners Court.

"Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. (Id.)"

Art. 1909 (1706) (1099) (1118) General Jurisdiction.

"Such court shall have general original jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate as may be provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 22; P. D. 1406.)"

Art. 1910. (1707) (1100) (1119) Motions against sheriffs, attorneys, etc.

"The district court shall have power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys, collected under the process of said court, or other defalcation of duty in connection with such process and of motions against attorneys for moneys collected by them and not paid over. (Acts 1846, p. 201, sec. 5; P. D. 1408; G. L., Vol. 2, p. 1507.)"

Art. 1911. (1708) (1101) (1120) May punish for contempt.

"The district court may punish any person guilty of contempt of such court by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days. (Acts 1846, p. 201; P. D. 1409; G. L., Vol. 2, p. 1507.)"

Appendix 6

Articles 1949-1960, Revised Civil Statutes of Texas, 1925

Article 1949. (1763) (1154) (1161) Exclusive original jurisdiction.

"The county court shall have exclusive original jurisdiction in

civil cases where the matter in controversary (controversy) shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest. (Const., Art. 5, sec. 16: Acts 1876, p. 172; G. L., Vol. 8, p. 1008.)"

Art. 1950. (1764) (1155) (1162) Concurrent original jurisdiction.

"The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest. (Id.)"

Art. 1951. (1766) (1157) (1164) No jurisdiction.

"The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits of the recovery of lands, nor suits for the enforcement of liens upon land, nor of suits in behalf of the State for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of corporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars. (Id.)"

Art. 1952) (1767) (1158) (1165) Appellate jurisdiction.

"The county court shall have appellate jurisdiction in civil cases over which the justice courts have original jurisdiction when the judgment appealed from or the amount in controversy shall exceed twenty dollars exclusive of costs. (Id.)"

Art. 1953. (1768) (1159) (1166) Certiorari to justice courts.

"The county court shall also have jurisdiction in cases brought up from the justice courts by certiorari."

Art. 1954. (1769) (1160) (1167) Motions against officers.

"The county court may hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process. (Acts 1876, p. 23; G. L., Vol. 8, p. 859.)"

Art. 1955. (1770) (1161) (1168) To punish for contempt.

"The county court may punish, by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, persons

"Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. (Id.; P. D. 1410.)"

Art. 1957. (1772) (1163) 1170) To grant remedial writs.

"The county judge, either in term time or vacation, may grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. (Const., Art. 5, sec. 16; Acts 1876, p. 19; G. L., Vol. 8, p. 855.)"

Art. 1958. (1773) (1164) (1171) Appointing attorneys.

"The county judge may appoint counsel to attend to the cause of any party who makes affidavit that he is too poor to employ counsel to attend to the same. (Acts 1846, p. 200, sec. 11; P. D. 1414; G. L., Vol. 2, 1506.)"

Art. 1959. (1774) (1165) (1172) Additional authority.

"The county court and the county judge shall also have such authority as may be vested in them by law."

Art. 1960. (1775) (1166) Changed jurisdiction; eminent domain.

"Where the jurisdiction of a county court has been taken away, altered or changed by existing laws, the same shall remain as established, until otherwise provided by law. Jurisdiction shall obtain in all matters of eminent domain over which the county courts have jurisdiction by the general laws of this State. (Acts 1885, p. 77; G. L., Vol. 9, p. 697.)"

Appendix 7

Articles 2385-2387, 2454, 2460, Revised Civil Statutes of Texas, 1925

Art. 2385. (2291) (1568) (1539) Jurisdiction.

"Justice courts shall, in addition to their other powers and duties, have and exercise original jurisdiction in civil matters of

all cases where the amount in controversy is two hundred dollars, or less, exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts, and of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction. (Const., Art. 5, sec. 19; Acts 1876, p. 155; G. L., Vol. 8, p. 991.)"

Art. 2386. (2293-4-5-7) Other powers.

"Justices of the peace shall also have power:

"1. To punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day.

"2. To issue writs of attachment, garnishment and sequestration within their jurisdiction, the same as judges and clerks of the district and county courts.

"3. To exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this State.

"4. To proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him."

Art. 2387. (2296) (1573) (1544) No jurisdiction.

"Justice courts have no jurisdiction of suits in behalf of the State to recover penalties, forfeitures and escheats, of suits for divorce, of suits to recover damages for slander or defamation of character, suits for the trial of title to land, or of suits for the enforcement of liens on land. (Const., Art. 5, sec. 8.)"

Art. 2454. (2391) (1663) (1638) Appeal.

"A party to a final judgment in any justice court may appeal therefrom to the county court where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs, and in such other cases as may be expressly provided by law. (Acts 1876, p. 154; G. L., Vol. 8, p. 990.)

Art. 2460. (2398-99) Certiorari.

"A cause tried before a justice, wherein the amount in controversy or the judgment exceeds twenty dollars, exclusive of costs, may be removed from such justice court to the county court by

certiorari under the rules prescribed in the title and chapter relating thereto. Whenever a writ of certiorari to remove any cause from the justice court to the county court shall be served on any justice of the peace, he shall immediately make out a certified copy of the entries made on his docket, and of the bill of costs, as provided in case of appeals, and send same, together with the original papers in the cause, to the clerk of the county court in the manner and within the time prescribed in the preceding article."

Appendix 8

Sections 3 and 6 of Article 5, Constitution of Texas.

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a Statute of the State is held void. The Supreme Court and the Justices thereof shall have the power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The Supreme Court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive, at the capital of the State.

"The Supreme Court shall appoint a clerk, who shall give bond

in such a manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. (Sec. 3, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891)."

"Sec. 6. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme Judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

"Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a (a) term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

"Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

"All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of

Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of (of) the Courts of Civil Appeals which may be hereafter created under this article after the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years, and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution. (Sec. 6, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

Appendix 9

Articles 1728 and 1819, (as amended) Revised Civil Statutes of Texas, 1925.

Art. 1728. (1521) (940) (1011) Appellate jurisdiction.

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any question of law.

"3. Those involving the construction or the validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

"Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error." (Acts 1927, 40th Leg., p. 214, ch. 144.)

"Art. 1819. (1589), (996). Jurisdiction defined.

The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed One Hundred Dollars exclusive of interest and costs." (As amended Acts 1929, 41st Leg., p. 68, ch. 33, § 1.)